SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970.

No.

MICHAEL HAYNEY & CHARLES HAMPTON,
Petitioners,

vs.

THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION.

To The Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The Petitioners MICHAEL HAYNEY and CHARLES HAMPTON respectfully represent:

OPINION BELOW.

The opinions of the trial court and appellate courts have not been reported. The trial court's oral opinion denying a Motion to Suppress Evidence, the opinion of the Superior Court of New Jersey, Appellate Division, and the Order of the Supreme Court of New Jersey denying Certification are appended hereto.

JURISDICTION.

Jurisdiction is invoked under 28 U. S. C. 1257(3) for review of the judgment of the Superior Court of New Jersey, Appellate Division, entered April 14, 1970. On May 26, 1970, the Supreme Court of New Jersey denied a Petition for Certification to review the judgment of the Appellate Division, the Notice of Petition for Certification having been filed on April 17, 1970. The ground for jurisdiction is that the judgment of the State courts denied the Petitioners rights, privileges, and immunities claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 605 of the Federal Communications Act, 47 U. S. C. 605 (Act of June 19, 1934, 48 Stat. 1103), provided on May 4, 1968 (prior to amendment of June 19, 1968):

> No person receiving, or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of trans-

mission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

QUESTIONS PRESENTED.

The following questions are presented by this Petition for Writ of Certiorari:

1. Whether the rights of Petitioners under the Fourth and Fourteenth Amendments to be secure against unreasonable search and seizure were violated by the issuance and execution of search warrants based upon an informant's tip of gambling on the premises, supported by a single instance of previous reliability and telephone calls made to an unknown location.

2. Whether the rights of Petitioners under the Fourth and Fourteenth Amendments to be secure against unreasonable search and seizure were violated by the seizure and use in evidence of property under a warrant commanding seizure of property used as a means of carrying on bookmaking and of lottery paraphernalia, without further particular description.

3. Whether the rights of Petitioners under the Fourth and Fourteenth Amendments to be secure against unreasonable search and seizure were violated by officers interfering with telephone lines and receiving telephone calls in the course of executing search warrants at premises suspected of housing gambling operations, where the warrants were silent as to reception of telephone calls.

4. Whether the rights of Petitioners under the Sixth and Fourteenth Amendments to be confronted with witnesses against them in a criminal proceeding were violated by a police officer testifying in a criminal proceeding paraphrasing the contents of telephone calls received in the course of a raid.

STATEMENT OF THE CASE.

This case arises from Indictments =353-68 and =354-68 filed in the Superior Court of New Jersey, Law Division

(Criminal), Camden County, on January 21, 1969. Indictment #353-68 charged both Petitioners with bookmaking, in violation of New Jersey Statute 2A:112-3. Indictment #354-68 charged both Petitioners with keeping a place to which persons might resort for gambling, in violation of the same statute.

Prior to the indictments, on May 4, 1968, Detective Jerome Spratley of the Camden City Police Department and four members of the New Jersey State Police raided the premises located in the rear basement of a building at 3007 Fenwick Road, Camden, New Jersey. The officers had in their possession two search warrants dated May 3, 1968, issued by Judge George L. Stransky of the Municipal Court of the City of Camden, upon the application of Detective George Sahlin of the Camden City Police. The officers gained entrance by forcing open a door leading from the outside directly into the rear basement. Upon entering the basement they found it filled with smoke and observed the Petitioners standing near a large table. The officers conducted a search of the premises and seized several items of property, for which Detective Spratley gave a receipt to the Petitioners.

At the time the officers entered the basement the telephone instruments located therein were inoperable. State Police Detective Anthony DeMasi had cut all telephone wires leading into the building just before the raid, and during the course of the raid he reconnected wires outside the building, making one instrument in the basement operable. Thereafter the officers remained on the premises and State Police Investigator John J. Carney answered telephone calls and had conversations with the callers.

After indictment both Petitioners entered pleas of not guilty to each indictment on February 6, 1969. A Motion to Suppress Evidence was made on March 6, 1969, based in part upon the grounds that the Petitioners' Fourth Amendment rights were violated by the issuance of search

warrants without probable cause, by the seizure of property not particularly described in the warrants, and by the reception or interception of telephone calls in excess of the authority of the search warrants. The Motion was heard by the Honorable Charles A. Rizzi, Judge of the County Court of Camden County on March 21, 1969, and was denied in an oral opinion on the same date. The Petitioners moved before the Superior Court of New Jersey, Appellate Division, for leave to appeal from the denial of the Motion. The Motion for Leave to Appeal was denied by the Appellate Division on April 30, 1969.

The Petitioners were tried on both indictments before Judge Rizzi and a jury on May 26, 27, and 28, 1969. At both the Motion hearing and at trial Detective DeMasi testified for the State concerning his part in the raid. He stated that he had cut six telephone lines outside the building to prevent an alarm being given before the premises were entered, and that the six lines were cut in "step fashion" to better identify the lines. He testified that he spliced one line leading to a basement telephone after encountering some difficulty matching the lines, and that Investigator Carney received calls on that line. Detective DeMasi said he had further difficulty reconnecting other lines and eventually disconnected all lines before leaving the premises after the raid. Investigator Carney testified at the Motion hearing that he had received telephone calls in the basement after Detective DeMasi made one instrument operable, and at trial testified, over defense objections, concerning the contents of telephone conversations with the callers. The substance of those conversations, according to Investigator Carney's testimony, was that they related to the placing of bets or requests for gambling information. There were also introduced in evidence by the State several items of property seized during the raid, including a Time Magazine, a Daily News newspaper, water-soluble paper, $420.00 in cash retrieved from inside a wall, and a

metal trash can. The jury found both Petitioners guilty on each indictment. On July 11, 1969, Petitioner Michael Hayney was sentenced by Judge Rizzi on Indictment #353-68 to a term of two to two and one-half years in New Jersey State Prison and a fine of $2,000.00, and was sentenced on Indictment #354-68 to a term of two to two and one-half years in New Jersey State Prison, to run concurrently. On the same date, Petitioner Charles Hampton was sentenced by Judge Rizzi on Indictment #353-68 to a term of one and one-half to two years in New Jersey State Prison and a fine of $1,000.00, and was sentenced on Indictment #354-68 to a term of one and one-half to two years in New Jersey State Prison to run concurrently.

The Petitioners took an appeal to the Superior Court of New Jersey, Appellate Division, filing a Notice of Appeal on July 11, 1969. That appeal was argued on March 23, 1970 and that court affirmed the Judgments of Conviction in an unreported opinion dated April 14, 1970. On April 17, 1970 the Petitioners filed a Notice of Petition for Certification in the Supreme Court of New Jersey. The latter court denied the Petition for Certification by its Order dated May 26, 1970.

ARGUMENT.

I.

The Petitioners' Fourth and Fourteenth Amendment Rights Were Violated by the Issuance and Execution of Search Warrants Without Facts Sufficient to Show Probable Cause of Illegal Activity.

The Fourth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth

Amendment, prohibits unreasonable searches and seizures and requires that probable cause be shown for the issuance of the search warrant. That showing, supported by oath or affirmation, must not be merely of belief or suspicion but of underlying facts or circumstances which justify a belief that there is a violation of law. *Nathanson vs. United States*, 290 U. S. 41 (1933). If such facts constituting probable cause are not presented the search warrant is invalid and evidence illegally obtained in executing the warrant must be suppressed. *Mapp v. Ohio*, 367 U. S. 643 (1961).

The United States Supreme Court has held that the application for a warrant may include hearsay so long as the hearsay appears to be trustworthy. *Aguilar vs. Texas*, 378 U. S. 108 (1964). The requirements of the Federal Constitution in testing hearsay information used for this purpose are set forth in the cited case: first, the application should set forth underlying circumstances to enable the magistrate independently to judge the validity of the informant's conclusions; second, the applicant should set forth facts to support his claim that the informant is credible or his information reliable. The application of this two-pronged test in a case similar to the present case was further delineated in *Spinelli vs. United States*, 393 U. S. 410 (1969).

In *Spinelli* the affidavit in support of the search warrant alleged that the F. B. I. had been informed by a confidential reliable informant that the defendant was operating a handbook and accepting wagers by means of telephones with two given numbers. The affidavit further set forth that telephone company records listed the two numbers in a certain apartment and that surveillance by F. B. I. agents showed that defendant had entered that apartment on several occasions. The Court held that in such a case the Magistrate could not credit the informant's tip even though the affiant swore that the informant was reliable, because he offered no facts or reasons in support of his conclusion. The Court considered it even more important that the other

branch of the *Aguilar* test was not satisfied in that the tip did not contain a sufficient statement of the underlying circumstances from which the informant concluded that defendant was engaging in illegal activity. Pointing out that there was no disclosure of the source by which the informant acquired his information, the Court states, "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail so that the Magistrate may know that he is relying on something more substantial than a casual rumor circulating the underworld or an accusation based merely on an individual's general reputation." 393 U. S. at 416. The Court further holds that the allegations of surveillance and that the defendant was known as a bookmaker and gambler do not sufficiently corroborate the informant's tip to cure the defect.

In the present case, the affidavit supporting the search warrant states that information was received from a reliable, confidential informant that Charles Hampton and Michael Hayney were bookmaking and writing numbers at the location described in the warrant and at a second unknown location and that the informant could dial 964-3671 and place bets. The only circumstances set forth to justify the claim that the informant was reliable is that the informant's information led to the arrest of Michael Hayney and others on one previous occasion. The affidavit further describes two occasions on which the affiant dialed 964-3671 and listened while the informant held conversations with persons identified as "Mike" or "Charlie". The single instance of receipt of reliable information from the informant is hardly sufficient to establish a general reliability without further circumstances being set forth. But more importantly there is no statement whatsoever as to the source of the information received by the informant: whether he had personally observed the activity alleged or was the recipient

of a mere rumor. While it might be contended that the allegations of two telephone calls cured the defect and supported the reliability of the tip that wagers could be placed by calling that phone number, there is absolutely nothing to indicate that the telephone was located at the described premises, nor was there anything else in the affidavit placing any illegal activity at the described premises other than the informant's naked assertion.

The affidavit does contain three short paragraphs relating instances of surveillance by officers other than the affiant. Eact of these paragraphs is bracketed with a marginal notation, "out GS," making it clear that no reliance was placed on these allegations, for corroboration or any other purpose, by the issuing Magistrate. Finally, the affiant seeks to support his belief that probable cause existed by alleging that he arrested Michael Hayney at the same location in January 1963. He fails to state that the search on that occasion was subsequently determined to be illegal and the charges against Michael Hayney were dismissed. To the extent that any reliance was placed upon this allegation in finding probable cause to issue the warrant, the warrant is fatally defective as the fruit of the illegal 1963 search.

The affidavit therefore fails to meet the test of *Aguilar vs. Texas, supra*, and of *Spinelli vs. United States, supra*, and is insufficient as a showing of probable cause to justify the issuance of a search warrant for the premises described. The search itself was therefore unlawful and the fruit of that search in the form of property seized or evidence obtained should have been suppressed. *Mapp vs. Ohio, supra.*

II.

The Petitioners' Fourth and Fourteenth Amendment Rights Were Violated by the Seizure and Use in Evidence of Property Not Particularly Described in the Search Warrants.

The Fourth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, requires that a search warrant describe with particularity the place to be searched and the things to be seized. It is mandatory that the things to be taken be set forth with sufficient particularity that nothing is left to the whim or discretion of the officers executing the warrant. *Marron vs. United States*, 275 U. S. 192 (1927).

Two search warrants were issued in the present case. One recites the applicant's description of the premises and the allegation that there is located on the premises "certain property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:112-3, bookmaking upon the running of horses, mares, and geldings." The second is identical except that it recites a violation of "2A:121-1, maintaining a lottery, and 2A:121-5, possession of lottery slips, said property consisting of number plays dedicated for lottery purposes and other lottery paraphernalia." Each warrant commands a search and seizure of "the property specified."

The descriptions in the warrants in the present case are so broadly stated as to include a wide range of property, as many items in common usage for legitimate purposes could also be used as a means of committing the offenses of bookmaking or lottery. Such an interpretation would leave the entire decision of what to seize to the whim of the executing officer, contrary to the constitutional command, thus permitting the unlimited search of a general warrant.

General warrants permitting a random search into a person's private books, letters, and papers in the hope of finding evidence of some crime have long been condemned and were said to be one of the prime targets of the Fourth Amendment to the United States Constitution. *Boyd vs. United States*, 116 U. S. 616 (1886). The issuing of such warrants is still condemned as unreasonable. *Stanford vs. Texas*, 379 U. S. 476 (1965). If this broad interpretation is given to the description of things to be taken, then the warrant is void and the search and seizure unlawful.

In order to sustain the validity of the warrant, a much narrower interpretation must be given to the description of property. In the absence of some showing that the items were actually in use as the means of committing the violations alleged, those items not inherently unlawful should not be seized. All of the items seized in the present case should therefore have been suppressed as evidence.

III.

The Petitioners' Fourth and Fourteenth Amendment Rights Were Violated by the Search and Seizure of Telephone Communications Beyond the Scope of the Search Warrants and Without Lawful Authority.

Before entering the premises described in the warrant the telephones in the basement as well as those in other parts of the building were rendered inoperable by a State Police Detective who cut all telephone lines leading to the building. After the raiding party gained entry to the basement the officer reconnected wires outside the building in such a way that calls were received on one of the telephone instruments located in the basement. The Petitioners were unable to hear the contents of the conversations or to identify the callers. After denial of Petitioners' Motion to

Suppress Evidence and over objections raised at trial, the officer receiving the calls was permitted to testify as to the content of the conversations, which testimony tended to show that the calls pertained to the placing of wagers.

The warrants did not by their terms authorize or command the officers to receive or intercept incoming telephone calls or to make any other use of the telephones. If it is contended that the telephone calls are "property" subject to search and seizure, this interpretation would have the effect of broadening the scope of the search warrant to permit a random search of telephone communications, thus creating an unlawful general warrant, as discussed in Point II above.

The right of privacy in the use of telephone communications was, of course, unknown at the time of the adoption of the Fourth Amendment of the United States Constitution, but cannot for that reason alone be excluded. That aspect of the right to privacy has been recognized by the Congress of the United States and some methods of invading that right have been prohibited by Section 605 of the Federal Communications Act, 47 U. S. C. 605. Since the search in question, certain means of eavesdropping and wiretapping within controlled procedures have been authorized. See 18 U. S. C. 2518, adopted June 19, 1968. But such authority must be strictly limited in order to avoid violation of the Fourth and Fourteenth Amendments. *Berger vs. New York*, 388 U. S. 41 (1967); *Katz vs. United States*, 389 U. S. 347 (1967). If the activity of the officers in the present case in receiving or intercepting all incoming calls was authorized by the warrants, this constituted in effect a general search of telephone communications invading the constitutional right of privacy and the warrant was therefore void.

It may be contended that the receipt of telephone calls and disclosure of the conversations is permissible because there is no "interception" or interference with the physical

line. *Rathbun vs. United States*, 355 U. S. 107 (1957). In the present case the officers did not merely answer a ringing telephone while they were on the premises conducting a search, but they also caused the telephones to ring by connecting or tampering with inoperable telephone instruments and wires. The established lines having been severed and a line then connected to a telephone instrument, it follows that there was a violation of the physical integrity of the line and a violation of Section 605. Evidence obtained in violation of Section 605 must be excluded in a State Court proceeding. *Lee vs. Florida*, 392 U. S. 378 (1968).

IV.

The Petitioners' Sixth and Fourteenth Amendment Rights Were Violated by the Use of Indirect Testimony of Persons Not Present in Court.

Two State's witnesses testified at trial that as members of the raiding party, they answered a number of telephone calls coming into the Petitioner's apartment. Over objections they paraphrased the content of telephone conversations, but were unable to identify the callers except to relate first names stated by some of the callers. The substance of the telephone conversations was offered to prove that persons outside the apartment called to place wagers with a person occupying the apartment and with the Petitioners specifically.

The Sixth Amendment to the Constitution of the United States made applicable to the States by the Fourteenth Amendment, guarantees the right of an accused to be confronted with witnesses against him. An embodiment or application of that right is made in the hearsay evidence rule: "Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness

while testifying at the hearing is hearsay evidence and is inadmissible except as provided . . ." Rule 63, Uniform Rules of Evidence, the rationale of the hearsay evidence rule is that "when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the asserter . . . can be received only when made upon the stand, subject to the test of cross-examination . . ." 6 Wigmore, Evidence (3rd Ed.) Section 1766.

The general rule regarding admission of the content of telephone conversations is said to be that evidence of the fact of the making or receiving of a telephone call, as distinguished from evidence of the substance of the conversation offered to establish the truth or validity of the assertions made, is admissible. *Annotation, Admissibility of Evidence of Fact of Making or Receiving Telephone Calls*, 13 A. L. R. 2d 1409. If it were the State's aim to prove only the fact of receiving a number of calls this could be established without testimony of the content of the conversations. The only purpose of relating such content is to establish the truth of the statements made by the callers, that is, that they genuinely related to obtaining gambling information or to the placing of bets. Such testimony renders all of the unidentified callers witnesses against the Petitioners without permitting the Petitioners to be confronted by such witnesses for the purpose of cross-examining them or countering their testimony, and the admission of such testimony was in violation of the Sixth and Fourteenth Amendments.

CONCLUSION.

For the reasons stated above, Petitioners pray that the Court grant a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

JOSEPH W. CLARKE, JR.,
Counsel for Petitioners.

Appendix

APPLICATION FOR SEARCH WARRANT

MUNICIPAL COURT OF THE CITY OF CAMDEN.

In the Matter of the Application for Search Warrant to Search that Part of Premises Known as the Rear Basement at 3007 Fenwick Road, City of Camden, State of New Jersey, Situated	Application for Search Warrant; Verified Complaint R. S. 2A:112-3.

State of New Jersey }
County of Camden } ss.

On this 3rd day of May 1968, before me, the undersigned judge of the Municipal Court of The City of Camden, ... personally appeared George Sahlin, who being duly sworn on his oath according to law deposes and says:

1. That he is a Detective for the City of Camden, and resides at 2804 Tyler Ave., in this county and state.

2. That he has good reason to believe and does believe that in and upon certain premises within the City of Camden, in this county and state to wit, the premises known as 3007 Fenwick Road in said City and more particularly described as follows: the rear basement, having a white outside door facing the North South Freeway. Said door has a square

cutout near the top portion. Directly behind this door there is a steel door which has a peephole. The basement section lies underneath the Fairview Gardens. There has been and now is located certain property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:112-3, bookmaking, upon the running of horses, mares and geldings.

3. That the facts tending to establish the grounds for this application, and the probable cause of deponent's belief that such grounds exist, are as follows: the attached report is hereby made part of this application.

WHEREFORE, deponent moves that a search warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

s/ GEORGE SAHLIN.

Subscribed and sworn to before me the day and year first above written.

s/ GEORGE E. STRANSKY, JR.,
Judge of the Municipal Court of
The City of Camden.

APPLICATION FOR SEARCH WARRANT.

MUNICIPAL COURT OF THE CITY OF CAMDEN.

In the Matter of the Application for Search Warrant to Search that Part of Premises Known as Rear Basement at 3007 Fenwick Road, City of Camden, State of New Jersey, Situated	Application for Search Warrant. Verified Complaint. R. S. 2A:121-1 & 3.

State of New Jersey
County of Camden } ss.

On this 3rd day of May, 1968, before me, the undersigned judge of the Municipal Court of The City of Camden, ... personally appeared George Sahlin, who being duly sworn on his oath according to law deposes and says

1. That he is a Detective for the City of Camden, and resides at 2804 Tyler Ave., in this county and state.

2. That he has good reason to believe and does believe that in and upon certain premises within the City of Camden, in this county and state to wit, the premises known as 3007 Fenwick Road in said City and more particularly described as follows: the rear basement, and having a white outside door facing the North South Freeway. Said door

has a square cutout near the top portion. Directly behind this door there is a steel door which has a peephole. The basement section lies underneath the Fairview Garden Saloon. There has been and now is located certain property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:121-1, maintaining a lottery, and 2A:121-3, possession of lottery slips, said property consisting of number plays dedicated for lottery purposes and other lottery paraphernalia.

3. That the facts tending to establish the grounds for this application, and the probable cause of deponent's belief that such grounds exist, are as follows: the attached report is hereby made part of this application.

WHEREFORE, deponent moves that a search warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

s/ GEORGE SAHLIN.

Subscribed and sworn to before me the day and year first above written.

s/ GEORGE E. STRANSKY, JR.,
Judge of the Municipal Court of
The City of Camden.

AFFIDAVIT FOR SEARCH WARRANT.

State of New Jersey
County of Camden } ss.

On this 3rd day of May 1968, before me, the undersigned Detective George Sahlin of the Camden Police Department, who being duly sworn upon his oath, deposes and says:

I make this affidavit in the performance of my duties as a law enforcement officer of the Camden Police Department, Camden, New Jersey. I have been a member of the Department for the past seven years, and am presently assigned as Commander of the Vice Control Unit, specializing in illegal gambling operations.

I have good reason to believe and do believe that in and upon certain premises within the City of Camden, County of Camden, and the State of New Jersey; the premises known as 3007 Fenwick Road, rear basement, and more particularly described as being a basement of the Fairview Gardens Saloon, there has been and now is located certain property used as a means of committing a misdemeanor in violation of the Laws of the State of New Jersey, to wit: Violation of R. S. 2A:121-1, maintaining a lottery, and R. S. 2A:121-3, possession of lottery slips, and R. S. 2A:112-3, bookmaking, said property consisting of numbers slips, horse bets, and monies dedicated to the use of said lottery and all other paraphernalia.

This illegal operation is being conducted by two white males known as Charles Hampton of 1021 Collings Road, Camden, white male, 28 years of age, 6 feet 4 inches in height, 200 lbs., black hair, medium build, and Michael Hayney of 2962 North Congress Road, Camden, white male, 29 years of age, 6 feet in height, 200 lbs., Camden P. D. number 17173.

The premises known as the rear basement at 3007 Fenwick Road is further described as having a white outside door facing the North South Freeway. Said door has a square cut-out near the top section. Directly behind this door there is a steel door which has a peep hole. Said basement lies underneath the Fairview Garden Saloon, which is owned and operated by Josephine and Arthur Canzanese. Said basement does not have any visible windows and is known as the Fairview Youth Club. However, it is not a youth club. The inside contains a pool table and a bar.

The facts tending to establish the grounds for this application, and the probable causes for my belief that such grounds exist, are as follows:

During the first part of April 1968, a confidential source, who has been very reliable in the past; his information leading to the arrest of Michael Hayney on 2 December 1968, and others, informed Det. Sergeant Justin Dintino of the New Jersey State Police and myself that Charles Hampton and Michael Hayney were bookmaking and writing numbers at the aforementioned location. Furthermore, that he could dial 964-3671 and place bets in our presence.

Our confidential source further added that Mike and Charlie were not always together, as they alternated at a second, unknown location.

At approximately 2:10 P. M., Friday, 19 April 1968, in the presence of Sgt. Dintino, I personally dialed 964-3671, and immediately, handed the telephone instrument to our confidential source. Sgt. Dintino and I, then held an extension receiver in such a position that we could hear both sides of the conversation which proceeded. Our informant identified himself and placed the following bets with the voice that responded to Mike: 109 for three dollars, and 959 for two dollars.

At approximately 1 P. M., Tuesday, 23 April 1968, in the presence of Sgt. Dintino, we used the same aforementioned procedure with our source. On this occasion our informant asked for Charles, but the voice responded that he was Mike and that Charlie had gone out for a while. Our source then identified himself and placed the following bet: a twenty dollar parlay with Rusty's Shadow, eighth at Aqueduct and Minotaws, ninth at Gulf.

Surveillances at the aforementioned locations revealed the following: On Thursday, 25 April 1968, Investigators Carney and Roller of the New Jersey State Police observed Charles Hampton enter the basement at approximately

11:50 A. M. At approximately 12 noon, Michael Hayney came out and walked to the front of the saloon.

On Friday, 26 April 1968, they observed Michael Hayney enter the basement at approximately 10:15 A. M.

On Saturday, 26 April 1968, Patrolman Hatfield of this unit observed a 1967 Ford Galaxie, black over white, N. J. registration #KZH-311, registered to Charles Hampton, drive up to the white door in the rear of 3007 Fenwick Road. Michael Hayney alighted from the car and entered the basement at approximately 10:17 A. M. Subsequent to this, the driver of the vehicle drove off.

Our informant related that he would settle his gambling debts with either Charles Hampton, or Michael Hayney or Vincent Canzanese, at the saloon.

I believe that as a result of the horse bets and number plays made by our confidential informant, plus the observations, I have shown sufficient probable cause to believe that illegal gambling operations are being conducted at the location described. Furthermore, I arrested Michael Hayney for possession of number slips, and bookmaking, on 22 January 1963, at the same basement location. On that occasion, I was able to trick him into opening the steel door by playing the part of a delivery boy.

Wherefore, I respectfully move that a search warrant may be issued authorizing a search of the basement at the rear of 3007 Fenwick Road, in a manner provided by law.

s/ GEORGE SAHLIN,
Camden Police Department.

Sworn and subscribed to before me this 3rd day of May, 1968.

s/ GEORGE E. STRANSKY, JR.,
Judge, Municipal Court.

SEARCH WARRANT.
MUNICIPAL COURT OF THE CITY OF CAMDEN.

State of New Jersey }
County of Camden } ss.

TO: Detective George Sahlin

Complaint on oath and in writing having been made before me, Judge of the Municipal Court of The City of Camden, New Jersey, on this day by you, alleging that you have good reason to believe and do believe that in and upon certain premises within The City of Camden, in this county and state, to wit: The premises known as rear basement, 3007 Fenwick Road in said City of Camden, and more particularly described as follows: having a white outside door facing the North-South Freeway. Said door has a square cutout near the top portion. Directly behind this door there is a steel door which has a peephole. The basement section lies underneath the Fairview Garden Saloon. There are no windows in the basement section. There has been and now is located certain property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:112-3, bookmaking, upon the running of horses, mares and geldings.

YOU ARE HEREBY COMMANDED to enter and search, with the necessary and proper assistance, the place hereinabove named for the property specified, serving this warrant and making the search in the day-time and to take into your possession all such specified property which may be found on the said premises, to the end that the same may be dealt with according to law.

YOU ARE FURTHER COMMANDED, in the event that you seize any of the above described articles, to give a copy of this warrant, together with a receipt for the property so seized, to the person from whom it is taken or in whose possession it is found, or in the absence of such person to leave a copy of this warrant, together with such receipt in the place where the said property is found.

YOU ARE FURTHER COMMANDED to execute this warrant within ten days from the issuance hereof, and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

GIVEN AND ISSUED under my hand at 10 o'clock P.M., this 3rd day of May, 1968.

s/ GEORGE E. STRANSKY, JR.,
Judge of the Municipal Court
of The City of Camden.

SEARCH WARRANT.

MUNICIPAL COURT OF THE CITY OF CAMDEN.

State of New Jersey)
County of Camden) ss.

TO: Detective George Sahlin

Complaint on oath and in writing having been made before me, Judge of the Municipal Court of The City of Camden, New Jersey, on this day by you, alleging that you have good reason to believe and do believe that in and upon certain premises within The City of Camden, in this county

and state, to wit: The premises known as rear basement, 3007 Fenwick Road in said City of Camden, and more particularly described as follows: having a white outside door facing the North-South Freeway. Said door has a square cutout near the top portion. Directly behind this door there is a steel door which has a peephole. The basement section lies underneath the Fairview Garden Saloon. There are no windows in the basement section. There has been and now is located certain property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:121-1, maintaining a lottery, and 2A:121-3, possession of lottery slips, said property consisting of number plays dedicated for lottery purposes and other lottery paraphernalia.

YOU ARE HEREBY COMMANDED to enter and search, with the necessary and proper assistance, the place hereinabove named for the property specified, serving this warrant and making the search in the day-time and to take into your possession all such specified property which may be found on the said premises, to the end that the same may be dealt with according to law.

YOU ARE FURTHER COMMANDED, in the event that you seize any of the above described articles, to give a copy of this warrant, together with a receipt for the property so seized, to the person from whom it is taken or in whose possession it is found, or in the absence of such person to leave a copy of this warrant, together with such receipt in the place where the said property is found.

YOU ARE FURTHER COMMANDED to execute this warrant within ten days from the issuance hereof, and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

GIVEN AND ISSUED under my hand at 10 o'clock P.M., this 3rd day of May, 1967.

/s/ GEORGE E. STRANSKY, JR.,
Judge of the Municipal Court
of The City of Camden.

ORAL OPINION.

Oral Opinion Denying Motion To Suppress Evidence, Delivered By Charles A. Rizzi, J. C. C. (Motion argued and decided, March 21, 1969):

The Court has before it an affidavit and an application for search warrant duly verified together with the search warrant which is directed against "bookmaking upon the running horses, mares and geldings" and a separate application which is directed against "maintaining a lottery, possession of lottery slips and property consisting of numbers play dedicated for lottery purposes and other lottering paraphernalia." The affidavit upon which the warrants were based speaks for itself. I shall not read it into the record, it is a part of the record of this proceeding. I have carefully read this affidavit with the attachment which is part of the affidavit for the purpose of weighing its value in the light of the argument that is made here today by the defendants and as more particularly set forth in the written brief heretofore filed.

Now, just to summarize the affidavit, it is the affidavit of Detective Sahlin of the Camden Police Department who states a conclusion that an illegal operation is being conducted by two persons, Charles Hampton and Michael Hayney, and then proceeds to describe the premises as being a rear basement at 3007 Fenwick Road having a white

outside door facing the Northsouth Freeway; further that said door has a square cut out near the top section directly behind which is a steel door with a peep hole and that this basement is underneath the Fairview Garden Saloon which basement has no visible windows and so forth. He then proceeds to state that during the early part of April, 1968, a confidential source described as being very reliable in the past informed Detective Dentino of the New Jersey State Police and George Sahlin that Charles Hampton and Michael Hayney were book making and writing numbers at the aforesaid location and that by dialing 964-3671 bets could be placed. He, the affiant, further stated that on Friday the nineteenth day of April, 1968 in the presence of Sergeant Dentino he personally dialed the number in question, handed the telephone to the confidential source and that he held an extension receiver while the informer identified himself and placed a bet with a voice that responded to the name of "Mike". Namely, 109 for three dollars and 954 for two dollars. The affidavit further states that on Tuesday, April 23, 1968, in the presence of Sergeant Dentino and the alleged informant Mr. Sahlin caused the number to be rung, at which time the informant asked for Charles but the voice responded that he was Mike and that Charley had gone out for a while, that he, the informant, then placed a bet consisting of a twenty dollar parlay with Rusty's Shadow, eighth at Aqueduct and Minhouse, ninth at Gulf.

The affidavit further indicates that surveillance at the address previously described, namely, 3007 Fenwick Road, on April 25, 1968, by Investigators Carney and Roller of the New Jersey State Police took place who observed Charles Hampton enter the basement at approximately 11:50 and that at approximately twelve noon Michael Hayney came out and walked to the front of the saloon, that on Friday, April 26th, 1968, they, meaning Carney and Roller, observed Michael Hayney enter the basement at approxi-

mately 10:15 a. m. and further that on Saturday, April 26th, 1968, Patrolman Hatfield of the Camden Police Department observed a 1967 Ford Gallaxy with New Jersey Registration KZN-311 registered to Charles Hampton drive up to the white door in the rear of 3007 Fenwick Road, that Michael Hayney alighted from the car and entered the basement at approximately 10:17 a. m. and that the driver of the vehicle then drove off. These are substantially the salient facts with which the Court is impressed and upon which this search warrant might have been based.

Now, it is urged by the defendants in their argument that the affidavit referred to is insufficient under the decision of the United States Supreme Court in Spinelli versus the United States decided January 27, 1969, and the citation of which is not offered to the Court and is not known to the Court at this time. However, the Court is familiar with the case having referred to it in an opinion in a case of State of New Jersey versus Charles Canzanese dated April 28, 1969, in which case the facts were very similar to those before the Court at the present time. The Court then and does now quote from Spinelli as follows: "We conclude then that in the present case the informant's tip even when corroborated to the extent indicated was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination, rather it needed some further support. When we look to the other part of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably committed."

Now, this Court pointed out on the Canzanese case and similarly states in this case that the informant's tip in this case does find ample support in the narration of the actual placing of bets with a person or with persons who could

fairly be inferred to be the defendants in this case, Michael Hayney and Charles Hampton. So that the Court is of the view that the Spinelli Case does not aid the position of the defendants in this case but that here we have more than ample facts in the record in this affidavit upon which the search warrant was based.

Now, the second point raised by the defendants is that the search and seizure was unlawful in that the search warrants did not particularly describe the property site. Reference has been made by the Court to the two search warrants in question. The one referring to lottery contains a reference to property consisting of numbers play dedicated for lottery purposes and other lottering paraphernalia and the Court is of the view that while this statement is not as articulate as it might have been, nevertheless it does refer to paraphernalia which is all that a Court could properly insert in a search warrant in a gambling case. The Court would certainly have no right to limit the search warrant to particular items unless the clear and unequivocal contents of the affidavit pointed specifically to items which were known to have been in existence. The Court must be practical in the outlook and judgment of the contents of these warrants and asserts that no further particularity than the general description to lottering paraphernalia need be made by the police officers.

In the search warrant having to do with bookmaking, the references are to "bookmaking upon the running of horses, mares and geldings," and while this does not say gambling paraphernalia referring to the illegal operations of bookmaking, a fair reading of the search warrant in the case quite clearly to the Court that this is what was intended and that, therefore, the terms or words "gambling paraphernalia" could and should be read into the search warrant and that the search warrant did, in fact and in law, authorize the officers to seize all gambling paraphernalia dealing with the illegal operation known as bookmaking that might be

found upon the premises. So the Court does not see any violation of the requirements of the law with respect to description of the property to be seized under either of these search warrants.

As to the third point, namely, that the receipt of telephone conversations was unlawful in that the officers acted in excess of the authority conferred by the search warrant, the argument made that there was an invasion of the rights of the defendants by reason of the cutting of the wires and the later hookup of the wires is one that has no appeal to the Court and actually is viewed by the Court as being frivolous in nature. This telephone wire was in existence at the time that the officers arrived on the scene, if the officers had not touched the wires and were successful in getting into the interior of the premises without any destruction of the wires from within, the officers in the view of the Court, would have had the right to intercept telephone calls coming in over those wires which would have been evidence under the Masco Decision and other decisions and it seems to the Court that the mere fact that these officers, for a valid reason testified to by the first witness this afternoon, cut the wires for the purpose of preventing telephone calls from being made from the inside to the outside for the reasons indicated, did not then prevent the officers from reattaching or reconnecting these wires after they had completed their raid and entered the premises. The Court is of the view that there is no basis for suppression under this third point.

For the reasons given, the Court is of the view that there is no basis under any of the arguments presented here today for the suppression of the evidence that was seized on the search and that, therefore, the motion for suppression of evidence should be denied. Order accordingly.

SUPERIOR COURT OF NEW JERSEY.
APPELLATE DIVISION.
A-174-68.

STATE OF NEW JERSEY,
Plaintiff-Respondent,
vs.
MICHAEL HAYNEY and CHARLES HAMILTON,
Defendants-Appellants.

Argued March 23, 1970. Decided April 14, 1970.

Before, JUDGES SULLIVAN, CARTON and HALPERN.

On Appeal from Superior Court, Law Division (Criminal), Camden County.

MR. ROBERT B. STITES argued the cause for appellants.

MR. I. MICHAEL HEINE, Assistant Prosecutor, argued the cause for respondent (MR. A. DONALD BIGLEY, Camden County Prosecutor, attorney).

PER CURIAM.

Defendants appeal from judgments of conviction for bookmaking and maintaining a gambling resort (N. J. S. A. 2A:112-3). Defendants attack their convictions as based on evidence illegally seized under an invalid search warrant. They assert that there was no probable cause for issuance of the warrant and that the warrant did not encompass telephone calls intercepted during execution of the warrant.

The police raided the basement of a saloon where they found the defendants standing alongside a large table and a metal can emitting smoke. The search uncovered $420, a package of water soluble paper, an Armstrong Racing Sheet dated August 1966, a Philadelphia Daily News dated May 4, 1968, and a telephone amplifier for three telephones situated on the table.

At the commencement of the raid, one officer had severed outside telephone lines leading into the basement in order to prevent a warning from being given. During the course of the search, one of the lines was reconnected and another officer answered telephoned horse racing and numbers bets placed by callers who unwittingly addressed themselves to "Mike" or "Charlie."

Defendants contend that the issuance of the search warrants involved here, being partially based upon information from an informant, was unconstitutional because of a failure to show the informant was reliable or to demonstrate that underlying circumstances supported the informant's conclusions that a crime was being committed on the premises. We find no merit in this contention.

The affiant's application asserted that the informant was reliable because his information had led to the arrest of defendant Hayney and others in the past. Corroboration of the informant's conclusion that defendants were violating the law on the premises sought to be searched is found in

the officer-affiant's statement that he overheard the informant place bets on the telephone with a "Mike" on two occasions (on the second occasion the informant asked for "Charlie" and "Mike" responded that he had gone out for awhile). The affiant also asserted that he had arrested defendant Michael Hayney at the same basement location for possession of number slips and bookmaking in 1963.

Even if it could be assumed the informant's reliability was not sufficiently buttressed by the fact that his prior information led to the arrest of defendant Hayney and others (apparently without resulting convictions), the application for the warrant, considered as a whole, nevertheless met constitutional requirements.

In *Spinelli v. United States*, 393 U. S. 410, 418, 89 S. Ct. 584, , 21 L. Ed. 2d 637, 644-45 (1969), the Supreme Court stated that if an informer's tip was found inadequate to support the issuance of a warrant, the other parts of the application should be scrutinized to determine whether they "would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." The affiant's assertion that he overheard the informant call in bets to "Mike" (who implicated "Charlie" in the operation) and that he had arrested defendant Hayney at the same location for bookmaking in 1963 sufficiently corroborated the informant's account to engender suspicion that a crime was being committed. It is irrelevant whether the affiant's 1963 arrest of Hayney led to his conviction. The outcome of the arrest does not obviate the affiant's personal knowledge that the defendant had engaged in illegal activity on the premises sought to be searched. An officer's experience with bookmaking activities should be taken into consideration when reviewing the sufficiency of his application for a warrant. *Cf. State v. Kasabucki*, 52 N. J. 110, 120-121 (1968). Therefore, defendant's contention that the search warrant was improperly issued is unwarranted.

Defendants next contend that their constitutional rights were violated because the search warrant did not explicitly authorize interception of telephone calls, the substance of which was revealed in the officer's testimony at trial. This contention lacks merit.

Two search warrants were issued in this case, both issued the same day. One provided for the seizure of "property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:112-3, bookmaking, upon the running of horses, mares and geldings." The second authorized seizure of "property used as the means of committing a misdemeanor in violation of the laws of the State of New Jersey, to wit: 2A:121-1, maintaining a lottery, and 2A:121-3, possession of lottery slips, said property consisting of number plays dedicated for lottery purposes and other lottery paraphernalia."

Our courts have laid down the rule that, generally speaking, search warrants are to be construed "on a common sense basis rather than upon a super technical basis requiring elaborate specificity." *State v. Daniels*, 46 N. J. 428, 437 (1966). A warrant ordering a search for "bookmaking paraphernalia" authorizes the seizure of telephones, "an indispensable facility for a bookmaker." *State v. Masco*, 103 N. J. Super. 277, 283 (App. Div. 1968). The intercepting of phone calls as part of a valid search and arrest, and permitting police to testify to the substance of the calls received, has long been approved. *State v. Campisi*, 49 N. J. 238, 240 (1967); *State v. Masco*, supra, 103 N. J. Super., at 283; *cf. State v. Carbone*, 38 N. J. 19 (1962).

Viewed in this light, the "lottery warrant" in this case was of adequate specificity to meet constitutional standards to include receipt of the phone calls testified to at the trial. Although less descriptive, the "bookmaking warrant" involved here was also sufficient to satisfy constitutional requirements. *Cf. State v. Seefeldt*, 51 N. J. 472, 490 (1968).

Furthermore, the telephone calls regarding bookmaking were received while the police were lawfully executing the more specific "lottery warrant" thereby depriving defendants of any substantial grounds for complaint against the "bookmaking warrant."

Additionally, defendants contend that the interception of the phone calls, even if authorized by the warrants, constitutes a general search of telephone communications in violation of the Federal Communications Act, 47 U. S. C. A. 605, and N. J. S. A. 2A:146-1.

The Federal Communications Act is not violated by law enforcement officials who answer telephone calls addressed to defendants during the execution of a valid search warrant. *United States v. Pasha*, 332 F. 2d 193 (7 Cir.), cert. denied, 379 U. S. 839 (1964); *State v. Carbone*, 38 N. J. 19, 24-26 (1962); see Annot., 9 A. L. R. 3d 423, 431-34 (1966). Nor was N. J. S. A. 2A:146-1 (repealed by L. 1968, c. 409, § 27) violated by police severance of the line at the commencement of the raid. Police, acting pursuant to a search warrant, have the right either to seize telephones (which implicitly includes the right to sever lines) where bookmaking is involved or to have the telephone company discontinue service. *See Lopez v. New Jersey Bell Tel. Co.*, 51 N. J. 362, 371-73 (1968). Nor are we persuaded that reinstatement of telephone service while the raid was in progress was a "mechanical interference" with the telephone system amounting to an illegal wiretap under the statute. *See State v. Ricciardello*, 107 N. J. Super. 357 (App. Div. 1969).

Neither *Lee v. Florida*, 392 U. S. 378 (1968), nor *Berger v. New York*, 388 U. S. 41 (1967), nor *Katz v. United States*, 389 U. S. 347 (1967), cited by defendants, control the disposition of this appeal. Those cases dealt with surreptitious wiretapping devices and procedures which failed to provide minimal protection against undue invasion of the

right to privacy. Since the police here acted consonant with constitutional principles by acquiring a search warrant prior to the raid, these cases are irrelevant.

Affirmed.

ORDER DENYING PETITION.
SUPREME COURT OF NEW JERSEY
C-347, September Term, 1969.

STATE OF NEW JERSEY,
Plaintiff-Respondent,
vs.
MICHAEL HAYNEY, et als.,
Defendants-Petitioners.

On Petition for Certification.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 26th day of May, 1970.

A TRUE COPY,
s/ JOHN H. GILDEA,

Clerk of the Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 575

STATE OF NEW JERSEY,

Respondent,

vs.

MICHAEL FRANCIS HANEY,

Petitioner,

and

CHARLES HAMPTON,

Defendant.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT, STATE OF NEW JERSEY

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STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether an affidavit offered in support of an application for a search warrant is constitutionally adequate where it gives:

(A) A specific description of the premises and of the crime being committed therein;

(B) Facts upon which the reliability of an informer can be objectively evalulated; and

(C) Details of an investigation personally conducted by the applicant officer which reveals that the suspect is seen entering and leaving the location which is sought to be searched, and that the suspect is conducting his illegal business at that location.

2. Whether a search warrant is sufficiently particular to authorize the executing officer to intercept telephone calls made to a premises during the course of a search where it contains the following authorization:

> If your there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] illegal practice.

3. Whether the Sixth and Fourteenth Amendments are respected in prosecutions for lottery and bookmaking where State's witnesses testify as to the contents of telephone calls received in the defendant's premises during the course of a warranted search?

OPINION BELOW: JURISDICTION: CONSTITUTIONAL PROVISIONS INVOLVED

The respondent (State) adopts as its own the recitations under the above headings which the petitioner has included in his petition for writ of certiorari.

STATEMENT OF THE CASE

The respondent adopts as its own the statement of the case which appears in the petitioner's brief, but adds, however, the following information:

1. New Jersey State Police Detective Anthony DeMasi, who testified for the State in rebuttal to the defendant's motion to suppress evidence taken during the course of the search, testified that after making the initial entry into the defendant's premises, before which time the incoming telephone lines were severed, he reconnected the primary line which served the premises; and

2. John J. Carney, a New Jersey State Police investigator, who also testified at that hearing, recalled that the calls which were received by the State Police during the course of their search were made on telephone number 609-963-3464, the primary line which Detective DeMasi had made operative.

ARGUMENT

POINT I

A search warrant meets Fourth and Fourteenth Amendment doctrine where it is issued on the basis of an application and affidavit which contains facts sufficiently precise to enable the issuing magistrate to independently evaluate the applicant's and his informant's conclusions, and where it sets forth the facts demonstrating the reliability of the applicant's informer.

The affidavit which supported the application for the two search warrants issued for the search of the defendant's premises conforms to applicable Fourth and Fourteenth Amendment doctrine. *See, e.g., Aguilar v. Texas*, 378 U.S. 108 (1964). The applicant, Detective George Sahlin, of the Camden City Police Department, Camden, New Jersey, first describes in detail the particular crimes which were thought to be continuously committed on the premises; namely, bookmaking, and, or, lottery. The affidavit continues by describing the defendant as one of the men known to be conducting the illegal operation. Next, there follows a precise description of the premises and its entrances.

Following those general assertions, the applicant then detailed information received by him from a confidential informer as to some of the activity which the defendant, as one of the operators, was conducting on the premises. Parenthetically, the affidavit does contain the information that past information, received from that informer, led to

the arrest of the defendant on a prior occasion for the same or similar activity. Specifically, the informer was able to give the applicant and other police officers the telephone number of a telephone which was located on the premises. In the presence of the applicant, the informer dialed that telephone number on two occasions and was able to place betting information with an individual who identified himself as "Mike" (Michael Hayney, the defendant).

Moreover, the applicant recited in the affidavit conclusions based upon his own personal surveillance of the premises. That surveillance enabled him to observe on various occasions the defendant both entering and leaving the premises.

If any generalization about the affidavit is permissible, one might only say that it is a model in its form.

Point II

A search warrant which provides that "if you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] . . . illegal practice" is sufficient in its particularity to meet the standard of the Fourth Amendment, and is sufficient to authorize the executing officers to intercept telephone calls made to the premises during the course of the search.

Under the circumstances of the instant case, *i.e.*, the peculiar crime of bookmaking and the nature of the instrumentalities incident to its perpetration, the search warrant which issued was proper under the principles of

federal and local law in both its form and execution. Recognizing the Fourth Amendment proscription against general searches to be irreproachable in purpose, *see, e.g.*, Lord Camden's opinion in *Entick v. Carrington*, 19 Howell St. Tr. 1029 (1765), discussed in *State v. Bisaccia*, 45 N.J. 504 (1965), nevertheless, the issue as to whether a search meets that standard must be resolved on the particular facts of the case; "there are no rigid rules." *State v. Daniels*, 46 N.J. 425, 436 (1966).

The scope of a search warrant is delimited by two sets of criteras; namely, description of the premises, and description of the items to be seized. Admittedly, both of those mandates are imposed because of society's determined effort to protect privacy from capricious invasions which might result if the scope of initially necessitated searches were left to the subjective discretion of zealous law enforcement personnel. See *Stanford v. Texas*, 379 U.S. 476 (1965) (which added that when literature is seized because of contained ideas it must be described with "scrupulous exactitude"):

With respect to the consideration of description of premises, state and federal cases recognize:

> It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.

See, *e.g.*, *Steele v. United States*, 267 U.S. 498 (1924); *State v. Daniels*, *supra*, at 436.

The element of description of things to be seized would appear to be controlled by the same standard. See, *e.g.*, *State v. Seefeldt*, 51 N.J. 472 (1968), where the Court, with respect to a description in a search warrant, held that the words "'weapons used in the crime of murder' . . .

were of adequate specificity to eliminate any room for the exercise of discretion by the searcher as to the items to be seized". *Id.* at 490.

The defendant draws in issue the general sufficiency of the description of the items to be seized and the particular inclusion within the warrant's language of telephone calls. The doctrines discussed above venerate the sufficiency of the warrant on both issues. See, *e.g.*, *State v. Masco*, 103 N.J. Super. 277 (App. Div. 1963), relying upon *Steele v. United States*, 267 U.S. 498 (1924) and *Stanford v. Texas*, 379 U.S. 476 (1965), which held that the description "bookmaking paraphernalia" was not only sufficiently precise, but also that:

> A telephone is an indispensable facility for a bookmaker . . . and as such obviously must be included in the description. . . . In this search for evidence to establish defendant's complicity in the crime they could lawfully receive such calls.
>
> *State v. Masco*, *supra*, at 283.

The *Masco* decision tacitly recognizes that every crime has its personal accoutrements, which depending on the situation, may or may not be described with a single word. Although a gun may be aptly described by the word gun, unfortunately the instruments of bookmaking may not of necessity have that same intrinsic identifiability. It is important that the words used conjure a sufficient Gestaldt in the minds of the executing officers. The rule of the Fourth Amendment is "reasonableness," *State v. Daniels*, *supra*, at 437, and it is not to be measured by "formalisms of no vital importance." *Id.*

Because the officers were authorized to seize the particular telephone calls related to bookmaking, they were indeed authorized to intercept all calls which came into the apartment during the circumscribed time incident to their search. That was as much a part of the authorized scope of the search as "cellars, broom closets, hallways, storage areas" are within the authorized scope of a search warrant directing the search of "such areas as are under the custody and control of a superintendent of . . . building. . . .". *Cf. State v. Sheppard*, 46 N.J. 526 (1966). See also *State v. Carbone*, 38 N.J. 19, 22 (1962).

Within this framework it cannot be said that the interception of the defendant's telephone calls violated either the letter or spirit of *Berger v. New York*, 388 U.S. 41 (1967), or *Katz v. United States*, 389 U.S. 347 (1967). Here we have, as contradistinguished from the facts in those cases, a narrowly circumscribed "surveillance" — if that term is appropriate here — which was authorized by a Superior Court judge who was notified of the need for the search. *Katz*, 389 U.S. at 354. Moreover, the case at bar does not present a surreptitious eavesdropping which was the subject of the Court's consternation in those decisions.

With respect to the dictates of the Federal Communications Act, 47 U.S.C. §605, as it has been construed in *State v. Carbone*, 38 N.J. 19 (1962), the State urges that the telephone calls were not intercepted by violating the integrity of the line; at the time the phone calls were received, the line was restored to its original condition.

POINT III

In prosecutions for lottery and bookmaking testimony of police officers as to bets placed by telephone callers to the defendant's premises are admissible as non-hearsay extra-judicial statements offered to prove the calls as operative facts.

In bookmaking and lottery prosecutions testimony as to incoming telephone calls received by police officers during the course of a search have been traditionally admitted into evidence. See, *e.g., State v. Masco, supra*, at 283, and the cases cited therein. Although less than explicit as to the justification and theory of admissibility, those decisions comport with sound evidential theory.

The defendant wrongly characterizes the testimony of the police officers as hearsay; that is, as extra-judicial statements offered to prove the truth or falsity of the facts asserted which deny the accused the right to confront his accusers. *McCormick, Law of Evidence*, 460 (1954); *New Jersey Rule of Evidence 63*. Properly construed, the calls were offered to prove the calls themselves as operative facts. When viewed in light of that purpose, the evidence is without the proscription of the hearsay exclusion. *McCormick, supra*, at 463. See, *e.g., Commonwealth v. Wiswesser*, 134 Pa. Super. 488, 3 A. 2d 983 (1939) (testimony as to defendant's agent to juror not hearsay in a prosecution for solicitation of juror). Indeed, this concept is embodied in annotation to *New Jersey Evidence Rule 63* prepared by the Rules of Evidence Study Commission. It provides:

> Evidence that the owner of a car gave instructions to a driver is not hearsay if offered to prove agency;

but it would be hearsay if the content of the instructions related to delivery, and were offered to prove delivery.

To interpose: evidence that a hopeful bettor gave a bet to a bookmaker is not hearsay if offered to prove bookmaking; but it would be hearsay if the content of the message related to a specific horse-race and were offered to prove the existence of same. See also *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410 (App. Div. 1961), *cert. den.*, 36 N.J. 297 (1962).

CONCLUSION

The decisions below rested upon both prevailing constitutional doctrine as well as specific local decisions which have considered the problems with not only constitutional sensitivity but with greater particularity. Accordingly, on the basis of the authorities advanced as applied to the record below the respondent prays that the petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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